Malaysia Building Society Bhd v Univein Sdn Bhd

HIGH COURT (SHAH ALAM) — ORIGINATING SUMMONS NO MT4–24–808 OF 1997
LOW HOP BING J
7 JANUARY 2002

Land Law *— Charge — Order for sale — Application for — Whether defendant showed any cause to the contrary — Whether application for order for sale should be granted — Rules of the High Court 1980 O 83*

This was the plaintiff's application for an order for sale in respect of three pieces of properties, which were charged by the defendant to the plaintiff as security for credit facilities granted by the plaintiff to the defendant.

Held, allowing the plaintiff's application:

(1) Although the plaintiff's affidavit in support was filed before the originating summons ('the OS'), the affidavit was not a nullity and therefore was admissible (see p 515B–C).

(2) The defendant's contention was that the plaintiff had breached O 83 r 2(1)–(7) of the Rules of the High Court 1980 ('the RHC'). However, O 83 r 2(2)–(7) of the RHC would only be applicable where the defendant had failed to enter an appearance. In the instant case, the defendant had entered appearance through its solicitors. A notice of appointment to hear the OS was served on the defendant and the counsels for the plaintiff and defendant had subsequently attended the hearings. No one was deprived of the right of being heard and accordingly, there was no merit to the defendant's contention (see pp 516G, 517E, 518B–C).

(3) There was strictly no requirement under O 83 r 3(3) of the RHC that the plaintiff's first affidavit include particulars such as the amounts of the advance, repayments and interest as well as the amount due under the charge. The particulars under O 83 r 3(3) of the RHC may be provided in the affidavit before the final hearing. In the instant case, the plaintiff had provided the statutory particulars in all the affidavits filed. Further, the plaintiff had also, in compliance with O 83 r 3(7) of the RHC stated the amount of a day's interest in one of the affidavits filed (see pp 518D–F, 519B–D, 520C).

(4) The Ministry of Housing and Local Government had granted exemption to the plaintiff pursuant to s 2A(2) of the Moneylenders Act 1951 ('the Act'). As such, the grant of the credit facilities by the plaintiff to the defendant did not contravene any of the provisions of the Act (see p 520H–I).

(5) The Form 16D notices issued by the plaintiff to the defendant did specify the breach as the notices stipulated that the defendant had

failed to pay the plaintiff all the sums due with interest and the defendant did not reply to the notices. In the circumstances, the Form 16D notices had complied with s 254 of the National Land Code 1965 ('the NLC') (see p 522C).

(6) The defendant's complaint that the plaintiff's claim of interest was excessive and irrecoverable had to be examined in the light of s 75 of the Contracts Act 1950. In order to invoke s 75, the defendant had to establish that the plaintiff's claim for interest was the amount to be paid in the case of a breach of contract under the charges and that the same was excessive in nature. In the instant case, the plaintiff's claim for interest was at the rate of 9.5%pa and this rate was not unusual or objectionable under s 75 of the Contracts Act 1950. In addition, the plaintiff's claim for interest over and above the 9.5%pa was sustainable under the provisions in the charge annexures as the defendant had agreed that the plaintiff may vary the interest rate at any time and notices of the variation of interest had been given by the plaintiff to the defendant from time to time. Since the defendant had agreed to the variation of interest, the question of excessive interest did not arise and the defendant's contention that the plaintiff's claim for interest was excessive and against public policy did not appear to have any merit (see pp 523B–E, 524B–G, 525D).

(7) The burden of proof was on the defendant to show the existence of cause to the contrary under s 256(3) of the NLC and the expression 'cause to the contrary' was limited to instances where: (a) the chargor was able to bring his case within any of the exceptions to the indefeasibility doctrine in s 340 of the NLC; (b) the chargor was able to demonstrate that the chargee had failed to meet the conditions precedent for the making of an application for an order for sale; and (c) the chargor was able to demonstrate that the grant of the order for sale would be contrary to some rule of law or equity. In the instant cases the defendant had failed to establish any cause to the contrary (see pp 526B–D, 527E–F).

[Bahasa Malaysia summary

Ini adalah permohonan plaintif untuk satu perintah jualan bagi tiga bidang tanah, yang digadaikan oleh defendan kepda plaintif sebagai cagaran bagi mendapatkan hutang daripada plaintif kepada defendan.

Diputuskan, membenarkan permohonan plaintif:

(1) Walaupun afidavit sokongan plaintif difailkan sebelum saman pemula ('SP'), afidavit tersebut tidak terbatal dan oleh itu dapat diterima (lihat ms 515B–C).

(2) Pertikaian defendan adalah bahawa plaintif telah melanggar A 83 k 2(1) hingga (7) Kaedah Mahkamah Tinggi 1980 ('KMT'). Walau bagaimanapun, A 83 k 2(2) hingga (7) hanya dapat diapplikasikan di mana defendan gagal untuk memasukkan kehadiran. Dalam kes ini defendan telah memasukkan kehadiran melalui peguamcaranya. Satu notis perlantikan untuk mendengar OS telah diberikan terhadap defendan dan peguam bagi plaintif dan defendan seterusnya menghadiri perbicaraan. Tiada sesiapa yang tidak dibenarkan dari hak untuk didengari dan sewajarnya, tiada merit terhadap hujah defendan (lihat ms 516G, 517E, 518B–C).

(3) Tiada keperluan langsung di bawah A 83 k 3(3) KMT bahawa afidavit pertama plaintif termasuk semua butir-butir seperi jumlah bayaran pendahuluan, jumlah bayaran balik dan faedah dan juga jumlah yang harus diberikan di bawah gadaian tersebut. Butir-butir di bawah A 83 k (3) KMT boleh dinyatakan dalam afidavit sebelum perbicaraan akhir. Dalam kes ini, plaintif telah membekalkan butir-butir statutori dalam semua afidavit yang difailnya. Lagipun, plaintif telah juga, seperti yang tertera dalam A 83 k 3(7) KMT menyatakan jumlah faedah sehari dalam salah satu afidavit yang difailnya itu (lihat ms 518D–F, 519B–D, 520C).

(4) Kementerian Perumahan dan Kerajaan Tempatan telah memberikan satu pengecualian kepda plaintif di bawah peruntukan s 2A(2) Akta Pemberi Pinjaman Wang 1951 ('Akta tersebut'). Dengan ini, pemberian hutang oleh plaintif kepada defendan tidak menyalahi sebarang provisi Akta tersebut (lihat ms 520H–I).

(5) Borang notis-notis 16D yang diisukan oleh plaintif kepada defendan menspesifikasikan pemungkiran ini sebagai notis-notis yang ditentukan bahawa defendan telah gagal untuk membayar plaintif semua jumlah wang dengan faedahnya dan defendan tidak membalas kepada notis-notis tersebut. Dalam keadaan ini, borang notis-notis 16D telah dikumpulkan dengan s 254 Kanun Tanah Negara 1965 ('KTN') (lihat ms 522C).

(6) Aduan defendan bahawa tuntutan faedah plaintif adalah keterlaluan dan tdak boleh diselesaikan harus diperiksa berdasarkan s 75 Akta Kontrak 1950. Untuk menggunakan s 75, defendan harus memastikan bahawa tuntutan faedah oleh plaintif adalah jumlah yang harus dibayar jika berlaku kemungkiran kontrak di bawah gadaian dan yang sama adalah keterlaluan. Dalam kes ini, tuntutan faedah oleh plaintif adalah 9.5% setahun dan kadar ini boleh di bantah di bawah s 75 Akta Kontrak 1950. Tambahan pula, tuntutan faedah oleh plaintif lebih daripada 9.5% setahun boleh dikekalkan di bawah provisi dalam anneksur gadaian kerana defendan telah bersetuju bahawa plaintif boleh mengubah kadar faedah pada bila-bila masa dan notis perubahan

faedah ini telah diberikan oleh plaintif kepada defendan dari semasa ke semasa. Oleh kerana defendan telah bersetuju untuk perubahan pada kadar faedah, soalan faedah yang keterlaluan tidak timbul dan pertikaian bahwa plaintif menuntut faedah yang keterlaluan dan berlawanan dengan polisi awam tidak berasas (lihat ms 523B–E, 524B–G, 525D).

(7) Beban membukti adalah pada defendan untuk menunjukkan kewujudan sebab-sebab yang berlawan di bawah s 256(3) KTN dan ekspresi 'kausa kepada kontrari' dihadkan kepada kes-kes dimana (a) penggadai boleh membawa kesnya dalam lingkungan kekecualian doktrin indefisibiliti dalam s 340 KTN; (b) penggadai dapat menunjukkan pemegang gadai telah gagal untuk mematuhi syarat-syarat duluan untuk membuat permohonan bagi satu perintah jualan; (c) penggadai dapat menunjukkan bahawa geran bagi perintah untuk jualan akan bertentangan dengan sebahagian peraturan ataupun ekuiti. Dalam kes ini defendan telah gagal untuk menetapkan sebaran sebab kepada kontrari (lihat ms 526B–D, 527E–F).]

Notes

For cases on order for sale, see 8 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1939–2020.

Cases referred to

Arab-Malaysian Finance Bhd v Serajudin bin Mohd Ismail & Anor [1998] 7 MLJ 536 (not folld)

Arab-Malaysian Merchant Bank Bhd & Ors v Court Square Pelita Sdn Bhd & Ors [2000] 5 MLJ 273 (refd)

Asia Commercial Finance (M) Bhd v Kimden Housing Development Sdn Bhd [1993] 1 MLJ 283 (refd)

Ban Hin Lee Bank Bhd v Pang Lai Hin [1999] 2 MLJ 234 (not folld)

Bangkok Bank Bhd v Chuan Kee Co Sdn Bhd [2000] 2 MLJ 113 (refd)

Bank Bumiputra Malaysian Bhd v Doric Development Sdn Bhd [1988] 1 MLJ 462 (refd)

Berg v Salder and Moore [1937] 2 KB 158 (refd)

Bhai Panna Singh v Bhai Arjun Singh (1929) AIR 179, PC (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331 (refd)

Bukit Melita Sdn Bhd v Lam Geok Hee & 7 Ors [1997] 4 AMR 3160 (refd)

Bunbury Foods Pty Ltd v National Bank of Australasia Ltd [1984] 153 CLR 491 (refd)

Chin Yoon Timber Co v Overseas Lumber Bhd [1978] 2 MLJ 173 (refd)

Citibank NA v Ibrahim bin Othman [1994] 1 MLJ 608 (refd)

Co-operative Central Bank Ltd (In recevership) v Feyen Development Sdn Bhd [1995] 3 MLJ 313 (refd)

A *Co-operative Central Bank Ltd v Meng Kuang Properties Bhd* [1991] 2 MLJ 283 (refd)
Credit Corp (M) Sdn Bhd v Lucky Height Development Sdn Bhd & Ors [1996] 4 MLJ 556 (refd)
Cuckmere Brick Co Ltd v Mutual Finance Ltd [1971] Ch 949 (refd)
Datuk Bandar Kuala Lumpur v Seman bin Amat & 2 Ors [1996] MLJU
B 540 (refd)
Datuk Ong Kee Hui v Sinyum anak Mutit [1983] 1 MLJ 36 (refd)
Development and Commercial Bank Bhd v Aspatra Corp Sdn Bhd & Anor and another appeal [1995] 3 MLJ 472 (refd)
Ee Kim Kin v The Collector of Land Revenue Alor Gajah [1967] 2 MLJ
C 89 (refd)
Gurbachan Singh v Seagrott & Campbell (No 2) [1962] MLJ 370 (refd)
Harun bin Taib v Khor Peng Soon [1991] 3 CLJ 2484 (refd)
Hong Kong Bank Malaysia Bhd v Nor Harizan Mohd Ali [1999] MLJU 146 (folld)
D *Jasabena Sdn Bhd v Beh Heng Poo & Anor* [1985] 1 MLJ 394 (refd)
Kandiah Peter v Public Bank Bhd [1994] 1 MLJ 119 (refd)
Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor [1989] 1 MLJ 457 (refd)
Kewangan Bersatu Bhd (previously known as Kewangan Usaha Bersatu Bhd) v Metropolitan Property Holdings Sdn Bhd [1996] 1 MLJ 79
E (folld)
Kimlin Housing Development Sdn Bhd (Rappointed receiver and manager) (In liquidation) v Bank Bumiputra (M) Bhd & Ors [1997] 2 MLJ 805 (refd)
Koh Kim Kuay, Re; ex p MBf Finance Bhd [1995] 2 CLJ 145 (refd)
Lee Boon Hooi, Re; ex p Tan Ket Huat [1992] 2 CLJ 699 (refd)
F *Lee Thye (sebagai Presiden dan Pemegang Jawatan Selangor Yan Keng Benevolent Dramatic Association) v Tan Sri Ngan Chin Wen (sebagai Presiden dan Pemegang Jawatan Dewan Perhimpunan China Selangor)* [1999] 7 CLJ 95 (folld)
Letchmy a/l Chengodam v Salahuddin bin Mukhtar [1994] 2 AMR
G 1550 (refd)
Lori (M) Bhd v Arab-Malaysian Finance Bhd [1999] 3 MLJ 81 (refd)
Low Lee Lian v Ban Hin Lee Bank Bhd [1997] 1 MLJ 77 (refd)
M&J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd [1994] 1 MLJ 294 (refd)
H *Mohd Sharif bin Sapie, Re; ex p Malayan Banking Bhd* [1992] 4 CLJ 1093 (refd)
Multi-Purpose Bank Bhd v Diamond Agreement Sdn Bhd [2000] 5 MLJ 576 (folld)
Muniandy a/l Thamba Kaudan & Anor v Development and Commercial Bank Berhad & Anor [1996] 2 CLJ 86 (refd)
I *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 (refd)
OCBC Bank (M) Bhd v Lean Seng Pottery Factory Sdn Bhd [1999] 2 MLJ 402 (refd)

Ooi Kiah Inn, Charles & Anor v Kukuh Maju Industries Sdn Bhd (formerly known as Pembinaan Muncul Hebat Sdn Bhd) [1993] 2 MLJ 224, SC (refd)
Pacific Centre Sdn Bhd v United Engineers (M) Bhd [1984] 2 MLJ 143 (refd)
Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong [1996] 3 MLJ 85 (refd)
Perwira Affin Bank Bhd (formerly known as Perwira Habib Bank Malaysia Bhd) v WT Low & Ng Realty Sdn Bhd [1997] 5 MLJ 185 (refd)
Perwira Affin Bank Bhd v Tan Tian Ser [1994] MLJU 156 (refd)
Public Bank Bhd v Chan Siok Lie & Ors [1989] 2 MLJ 305 (refd)
Public Feedmill (M) Sdn Bhd (in liquidation) v Hai Yeu Hin [1994] 2 MLJ 34 (refd)
Pusat Bandar Damansara Sdn Bhd & Anor v Yap Han Soo & Sons Sdn Bhd [2000] 1 MLJ 513 (refd)
Raja Guppal a/l Ramasamy v Segaran a/l Pakiam [1999] 2 MLJ 677 (refd)
Ratnam v Cumarasamy & Anor [1965] 1 MLJ 228 (refd)
Realvest Properties Sdn Bhd v Co-operative Central Bank Ltd (In under receivership) [1996] 2 MLJ 461 (refd)
Reliance Shipping & Travel Agencies v Low Ban Siong [1996] 2 MLJ 543 (refd)
S Ravi a/l G Suppiah v Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor [1995] 2 CLJ 152 (refd)
Sam Hin Timber Trading Co v Perusahaan Sri Duyong Sdn Bhd [1983] CLJ 838 (refd)
Sari Atlantic Sdn Bhd v Aik Kim Enterprise [1988] 1 MLJ 201 (refd)
Selvarani a/p KV Velusamy v Sundara Raju a/l Kasamoorthie [1999] MLJU 223 (folld)
Shobri bin Hassan v Ramalingam [1993] 1 MLJ 263 (refd)
Siong Holdings Sdn Bhd v Development and Commercial Bank Bhd [1997] 1 MLJ 340 (refd)
Sobri bin Arshad v Associated Tractors Sdn Bhd [1991] 3 MLJ 32 (distd)
Sogolease Advance (M) Sdn Bhd v Jantsco Sdn Bhd & Ors [2001] MLJU 61 (refd)
SS Maniam v The State of Perak [1957] 23 MLJ 75 (refd)
Standard Chartered Bank Ltd v Walker & Anor [1982] 3 All ER 938 (refd)
Standard Chartered Bank Malaysia Bhd v Arivalagan Krishnan & Anor [2001] MLJU 379 (folld)
Sykt Kewangan Melayu Raya v Malaysian Banking Bhd [1986] 2 MLJ 253 (refd)
Sykt Telekom Malaysia Bhd v Business Chinese Directory Sdn Bhd [1994] 2 MLJ 420 (refd)
Tan Kai Kok v Thor Teik Seng [1935] MLJ 91 (refd)
Teoh Thean Peng v D&C Leasing Sdn Bhd [1993] 2 CLJ 665 (refd)
Theresa Chong v Kin Khoon & Co [1976] 2 MLJ 253 (refd)

A *Ting Hua Yiew v Ace Commercial Enterprise Sdn Bhd* [1996] 2 MLJ 678 (refd)
United Malayan Banking Corp Bhd v Palm & Vegetable Oils (M) Sdn Bhd & Ors [1983] 1 MLJ 206 (refd)
Wee Wood Industries Sdn Bhd v Guannex Leasing Sdn Bhd [1990] 2 CLJ 1060 (refd)
B *Yang Lak Man v Yang Paw Man* [1999] 4 MLJ 621 (folld)
Yip Chee Seng Sons & Sdn Bhd v Ornaconstruction Corp Sdn Bhd [1998] MJLU 93 (folld)
YK Fung Securities Sdn Bhd v James Capel (Far East) Ltd [1997] 4 CLJ 300 (refd)

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Legislation referred to

Bar Council Rulings 1997 Part H
Companies Act 1965 ss 67, 133
Contracts Act 1950 ss 24(a), (b), (e), 25, 75
D Contracts Act 1782 [India] s 74
National Land Code 1965, ss 256, 256(3), Form 16D
Moneylenders Act 1951 ss 2A(2), 16, 17, 21, 22, 23
Rules of the High Court 1980 O 56 r 1(3), O 83

Richard WG Lee (*Cheah Teh & Su*) for the defendant.
E *Wong Kian Kheong* (*Cheah Soo Chuan* with him) (*Lee Hishammuddin*) for the plaintiff.

Low Hop Bing J:

Application

F This is the plaintiff's application in encl (2) for an order for sale of three pieces of properties held under No CT 8150, Lot No 167, Seksyen 63, Bandar Kuala Lumpur, Negeri Wilayah Persekutuan; Geran No 9978, Lot No 147, Seksyen 63, Bandar Kuala Lumpur Negeri Wilayah Persekutuan and CT 14077, Lot No 210, Seksyen 63, Bandar Kuala
G Lumpur, Negeri Wilayah Persekutuan ('the properties') all of which were charged by the defendant in favour of the plaintiff by way of two memoranda of charges, vide presentation No 16320/95 and 16321/95 ('the charges'), pursuant to s 256 of the National Land Code 1965 ('the NLC') and O 83 of the Rules of the High Court 1980 ('the RHC').

H *Facts of the case*

By a loan agreement dated 26 July 1995 ('loan agreement'), the plaintiff granted to the defendant two loan facilities viz a term loan of RM23.5m ('term loan') and a bridging loan of RM36.5m ('bridging loan').

By the charges registered on 12 November 1995, the defendant charged
I the properties to the plaintiff, as security for the repayment of all principal sums outstanding under or in connection with the term loan and bridging loan ('the loans') together with interest thereon.

The plaintiff disbursed RM23.5m under the term loan and RM2.3m under the bridging loan to the defendant on 1 August 1995.

In breach of the charges, the defendant had failed to pay interest starting from the month of August 1995, as a result of which by a letter dated 3 October 1995, the defendant had, among others, applied for a moratorium on the payment of interest for six months.

By a letter dated 9 November 1995, the plaintiff rejected the defendant's said request, but instead granted an indulgence to the defendant, in that the defendant's account was allowed to be in the state of arrears of interest for a period not exceeding three months only.

Nothwithstanding the indulgence from the plaintiff, in breach of the charges, the defendant had failed to pay arrears of interest for a period of more than three months.

By letters dated 23 January 1996, 14 March 1996 and 22 July 1996, the plaintiff had, among others, requested the defendant to update its account or to reduce the arrears in payment of interest for a period not exceeding three months. However, the defendant had again failed to settle the arrears of interest in its account.

By two letters dated 2 October 1997, the plaintiff's former solicitors demanded for payment of the principal, interest and all other sums payable under the loans.

By two notices in Form 16D dated 17 October 1997 ('Form 16D notices'), the plaintiff called upon the defendant to remedy its default in respect of the charges. As the defendant has failed to do so, the plaintiff filed this application.

Submission for defendant

The defendant resisted the plaintiff's application. Mr Richard WG Lee, learned counsel for the defendant, submitted in great detail, that there is 'cause to the contrary' under s 256(3) of the NLC so that an order for sale should not be granted. The lengthy submission presented for the defendant covered such areas as procedural improprieties or nullities; illegality and breach of public policy; plaintiff's premature and flawed demands in Form 16D notices; land acquisition by the government; penalty or excessive interest; and finally wrongful and excessive variation of interest.

Under the first issue relating to procedural improprieties or nullities, it was submitted for the defendant that the plaintiff's affidavit in support was affirmed before the originating summons was filed and learned counsel said he was fortified by four decisions, viz *Arab-Malaysian Finance Bhd v Serajudin bin Mohd Ismail & Anor* [1999] 1 AMR 118; *Ban Hin Lee Bank Bhd v Pang Lai Hin* [1998] 7 MLJ 536; *Chin Yoon Timber Co v Overseas Lumber Bhd* [1978] 2 MLJ 173; and *Sobri bin Arshad v Associated Tractors Sdn Bhd* [1991] 3 MLJ 32.

He then launched a submission on the plaintiff's alleged breach of several provisions in O 83, viz r 2(2), (3), (4) and (5); r 3(3), r 3(3)(b), (c),

A r 3(4), r 3(6) and r 3(7) of the RHC and garnered the support of *Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong* [1996] 3 MLJ 85 at p 93 and *Ting Hua Yiew v Ace Commercial Enterprise Sdn Bhd* [1996] 2 MLJ 678 at p 686 in respect of the interpretation of the word 'must' in O 32 r 13(2)(b), vis-a-vis the interpretation of the word 'must' in O 83 r 2(2), which he said made it mandatory for the plaintiff, not less than four clear days before the day B fixed for the first hearing of the originating summons, to serve on the defendant a copy of the affidavit in support of the summons. He added that the first hearing date of the plaintiff's originating summons was 23 June 1998, the originating summons should have been served on the defendant at any time prior to 23 June 1998 but was only served sometime in July C 1998. He also contended that an adjournment did not constitute an automatic extension of time for the plaintiff to comply with O 83 r 2(2) and relied on *Public Feedmill (M) Sdn Bhd (in liquidation) v Hai Yeu Hin* [1994] 2 MLJ 34, pertaining to the interpretation of O 56 r 1(3) of the RHC.

It was further contended for the defendant that the plaintiff claiming delivery of vacant possession has failed to comply with the mandatory D provisions of O 83 r 2(3) of the RHC. It was argued that other than the notice of appointment for the adjourned hearing on 24 August 1998, the plaintiff did not serve any other notice of appointment for subsequent adjourned hearings and that the plaintiff was in breach of O 83 r 2(4) of the RHC, in the absence of any direction given by the court. Further, it was said E that the plaintiff has failed to comply with O 83 r 2(5) of the RHC.

Learned counsel then canvassed that the plaintiff's failure to state the circumstances under which the plaintiff's right to possession arose constituted a breach of O 83 r 3(3) of the RHC. He added that the plaintiff's affidavit in support has failed to state the amount of repayments under O 83 r 3(3)(b) of the RHC; or the amount of any interest or instalments in arrears F at the date of the issue of the originating summons and at the date of the affidavit in support, as required under O 83 r 3(3)(c) of the RHC. He said that the plaintiff has failed to comply with O 83 r 3(4), (6) and (7) pertaining to stating the amount of a day's interest as the plaintiff's claim included a claim for interest.

G He concluded on this issue that rules of court must be complied with and cited in support *Ratnam v Cumarasamy & Anor* [1965] 1 MLJ 228 JCPC; *Raja Guppal a/l Ramasamy v Segaran a/l Pakiam* [1999] 2 MLJ 677 (CA); *Sykt Telekom Malaysia Bhd v Business Chinese Directory Sdn Bhd* [1994] 2 MLJ 420 (SC); *S Ravi a/l G Suppiah v Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* [1995] 2 CLJ 152 at p 154 (HC); *Pacific* H *Centre Sdn Bhd v United Engineers (Malaysia) Bhd* [1984] 2 MLJ 143 at p 148 HC; *Shobri bin Hassan v Ramalingam* [1993] 1 MLJ 263 (HC); *Letchmy a/l Chengodam v Salahuddin bin Mukhtar* [1994] 2 AMR 1550 (HC); *M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294 and in particular s 256(2) of the NLC.

I On the issue of illegality and breach of public policy, it was argued that the charge is null and void and unenforceable because the plaintiff which is governed by the Moneylenders Act 1951 has breached ss 16, 17, 21, 22 and

23 thereof, and that the exemption under s 2A(2) which has not been gazetted is ineffectual. A

The defendant then relied on s 24(a), (b) and (e) and/or s 25 of the Contracts Act 1950 to support the contention that the charges and any guarantee and transaction thereunder are null and void and unenforceable by reason of illegality and breach of public policy, citing *Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 MLJ 457 JCPC; *Chitty on Contracts* (26th Ed) paras 1134–1135 at p 688; *Berg v Sadler and Moore* [1937] 2 KB 158; *Harun bin Taib v Khor Peng Song* [1991] 3 CLJ 2484 (HC); *Ooi Kiah Inn, Charles & Anor v Kukuh Maju Industries Sdn Bhd (formerly known as Pembinaan Muncul Hebat Sdn Bhd)* [1993] 2 MLJ 224 SC; and *Datuk Ong Kee Hui v Sinyum anak Mutit* [1983] 1 MLJ 36 (FC). B C

The defendant complained that in view of the plaintiff's moratorium granted to the defendant on 9 January 1995, in respect of interest for every three months on a roll-over basis, the cancellation of the bridging loan and the notices in Form 16D issued by the plaintiff on 17 October 1997 and the foreclosure action herein, claiming the full sum, including all interest as well as default interest, in total disregard to the moratorium are premature and misconceived, and that the plaintiff is estopped from both cancelling the bridging loan and initiating the action herein, relying on *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 at pp 344–348. It was further argued that the issuance of Form 16D notices and the commencement of the action herein by the plaintiff are tainted with bad faith as the plaintiff ought not to be allowed to approbate and reprobate, or blow hot and cold. Reliance was placed on *Ee Kim Kin v The Collector of Land Revenue, Alor Gajah* [1967] 2 MLJ 89 at p 91; and *Development & Commercial Bank Bhd v Aspatra Corp Sdn Bhd & Anor and another appeal* [1995] 3 MLJ 472 at p 480. It was also said that the plaintiff has waived its right to cancel the bridging loan, issue Form 16D notices and initate the action herein, as the plaintiff's claim has been compromised by reason of the moratorium which satisfied the second and third limb of 'cause to the contrary' as defined in *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77 at pp 44–46 (CA). D E F

The next issue raised for the defendant is that the Form 16D notices issued by the plaintiff were flawed as they had run foul of s 254 of the NLC, in that the Form 16D notices for the charges did not set out any one of the events of default listed in cl 7.1(a)(i)–(xv) contained in the annexures to the charges. It was said that the Form 16D notice issued for presentation No 16320/95 merely stated that the defendant was in breach of the charge provisions by failing to pay the plantiff RM26,697,812.09 as at 31 January 1997 and interest, as at the date of notice and still continuing, while that for presentation No 16321/95 stated that the defendant was in breach of the charge provisions by failing to pay the plaintiff the sum of RM2,614,453.70 and interest as at the date of notice and still continuing. Learned counsel submitted that for the defendant to be in breach as aforesaid, there must firstly be a legal obligation on the part of the defendant to pay the plaintiff the aforesaid sums respectively before Form 16D notices were issued. He added that there was no legal obligation on the defendant to pay the G H I

aforesaid sums to the plaintiff prior to the issue of the Form 16D notices and hence there was no breach by the defendant, in which case these notices were inherently flawed, invalid and ineffectual and so the issue of the defendant remedying the breach did not arise. He continued that the plaintiff's failure to state the amount in respect of the interest rendered the notices vague, ineffectual and void for want of compliance with s 254(1)(a) the NLC, drawing support from the Supreme Court decision in *Kimlin Housing Development Sdn Bhd (Appointed receiver and manager) (in liquidation) v Bank Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805, and that the defendant has satisfied the second and third limbs of 'cause to the contrary' as defined in *Low Lee Lian* above.

The defendant then ventilated that the plaintiff has without any acceptable reason failed to collect the compensation paid by the government for the acquisition of part of the properties, resulting in an act of indolence, and added that a mortgagee owes a duty of care towards the mortgagor so as to reduce the debt, failing which the mortgagor's indebtedness is to be reduced accordingly in equity. *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949; *Standard Chartered Bank Ltd v Walker & Anor* [1982] 3 All ER 938; and *United Malayan Banking Corporation Berhad v Palm & Vegetable Oils (M) Sdn Bhd & Ors* [1983] 1 MLJ 206 (FC) were cited in support thereof. It was argued for the defendant that if the plaintiff had collected the compensation in good time, the defendant's alleged debt would have been substantially reduced.

The issue of penalty or excessive interest was raised for the defendant, in that the plaintiff's claim for excessive interest began from 9.5%pa in 1998 which from time to time was varied to 9.75%, 10.25%, 11.25%, 11.75%, 13%, 16.5%pa and at present is 10.5%pa for the term loan and 10.25%pa for the bridging loan, besides the additional interest at 1%pa, which was said to constitute a penalty, was excessive, unconscionable and irrecoverable under s 75 of the Contracts Act 1950, seeking support in *Wee Wood Industries Sdn Bhd v Guannex Leasing Sdn Bhd* [1990] 2 CLJ 1060 HC; *Low Lee Lian* above; *Co-operative Central Bank Ltd (In receivership) v Meng Kuang Properties Bhd* [1991] 2 CLJ 1144; and *Perwira Affin Bank Bhd (formerly known as Perwira Habib Bank Malaysia Bhd) v WT Low & Ng Realty Sdn Bhd* [1997] 5 MLJ 185. It was further contended that the aforesaid variation of interest is against public policy.

Finally, it was stressed that there are disputed facts which rendered the originating summons patently unsuitable, and concluded that the defendant has clearly shown 'cause to the contrary', so that the plaintiff's application ought to be dismissed with costs.

Plaintiff's case

Mr Wong Kian Kheong and Mr Cheah Soo Chuan, both learned counsel for the plaintiff, submitted that in an application for sale, the burden of proof lies on the defendant to show the existence of 'cause to the contrary' under s 256(3) of the NLC which had been given a very narrow and restrictive interpretation by the Federal Court in *Low Lee Lian*. It was said

for the plaintiff that since there is no 'cause to the contrary', an order for sale ought to be granted. A

On the preliminary objection based on procedural improprieties or nullities, it was argued for the plaintiff that the defendant had failed to give notice thereof and that the plaintiff was taken by surprise, in which case the preliminary objection should be dismissed. B

In any event, it was submitted for the plaintiff that there is no requirement in law for an affidavit such as encl (1) to be affirmed at the same time with or after the filing of the originating summons. Counsel added that such an affidavit may still be used subject to the condition that it be re-sworn and re-filed. C

It was contended for the plaintiff that O 83 r 2 of the RHC applies only where a defendant fails to enter an appearance, but does not apply in this case, eg where the defendant herein had entered an appearance on 22 July 1998 in encl (5) and the plaintiff had duly served a 'notice of appointment to hear the originating summons' dated 24 July 1998 in encl (4). D

It is the plaintiff's case that there is no requirement in law that all particulars under O 83 r 3 of the RHC must be included in the first affidavit and that the plaintiff has provided sufficient particulars in all the affidavits filed herein, thereby also complying with O 83 r 3(3), (6) and (7) of the RHC.

On the issue of illegality and breach of public policy, it was argued for the plaintiff that the alleged breach by the plaintiff of ss 16, 17, 21, 22 and 23 of the Moneylenders Act 1951 and ss 24(a), (b) and (e) and 25 of the Contracts Act 1950 did not arise and did not constitute 'cause to the contrary'. E

It was then argued for the plaintiff that the moratorium on the payment of interest for a period not exceeding three months was only an indulgence to the defendant as the defendant was unable to pay interest from the month of August 1985 when the loan was disbursed, and that the defendant was liable to pay the plaintiff all sums secured under the charges, as the question of estoppel, approbation or reprobation does not arise. F

In relation to the alleged flaw in the Form 16D notices issued by the plaintiff, it was opined for the plaintiff that there was no obligation on the part of the plaintiff to give any reason on the principal, interest and all other sums payable under the charges and that the defendant was not prejudiced. In addition, it is the plaintiff's case that the plaintiff has complied with the requirements of s 254 of the NLC. G H

On the issue pertaining to land acquisition, it was submitted that the plaintiff managed to obtain the compensation on 4 February 2000 and the delay was not due to the plaintiff's fault.

In the plaintiff's opinion, the penalty or excessive interest is only to be paid in the event of the defendant's breach under the charges and is nothing unusual or objectionable, being outside the ambit of s 75 of the Contracts Act 1950. I

A Finally, the plaintiff contended that the defendant's allegation of wrongful and excessive variation of interest is without merit as the charges do provide for such variation.

In the circumstances, the plaintiff prays for an order in terms of the application in encl (2).

B

Decision of the court

Preamble

The defendant's learned counsel has commended himself to the mobilisation C of all the provisions of procedural law relating to charge actions under O 83 of the RHC, in addition to the precepts of every substantive law under the NLC and indeed every nook and corner of the law of the land, thereby leaving absolutely no stone unturned, for the purpose of avoiding an order for sale. Be that as it may, one thing is crystal clear. The initiative to apply for and obtain the approval and consequential disbursement of the loans D originated from the defendant. The loans were given legal effect after the plaintiff and the defendant had sought and obtained legal advice and representation resulting in the documentation of the charges and their eventual registration.

At the time of the disbursement of the loans, there was apparent E happiness all round and nothing turned on the illegality, invalidity or unenforceability of the loans. The inability of the defendant to maintain and service the loans has resulted in the heaping of the aforesaid submissions for the defendant. Nevertheless, in the light of the various issues raised for the defendant herein, it is incumbent upon this court to determine on their merits.

F

Preliminary objections

It is to be noted that in the six or more affidavits filed by the defendant to resist the plaintiff's application herein, the defendant did not advert to any preliminary objection, nor give the plaintiff any notice of the defendant's G intention to raise preliminary objections, which only surface now in the submissions presented for the defendant, thereby springing surprises on the plaintiff. In such a situation, part H, para 19(a), (b) and (c) of the Bar Council Rulings 1997 requires that a written notice be given. Paragraph 19(a), (b) and (c) read as follows:

H Notice of Preliminary Objections

(a) An advocate and solicitor shall give written notice, whether by letter, facsimile message or otherwise, to the advocates and solicitors representing all the other parties in the litigation, of his intention to raise a preliminary objection during the hearing of any matter before any court, tribunal or other body authorized to conduct hearings.

I

(b) Such written notice shall be delivered to the other advocates and solicitors within a reasonable period before the hearing but not later than 48 hours before the hearing to enable the said advocates and solicitors to

properly prepare themselves and to secure instructions from their clients with regard to the proposed preliminary objection. A

(c) Such written notice shall set out in sufficient detail:
(i) the nature of the proposed preliminary objection;
(ii) a list of authorities that counsel moving the court for the preliminary objection intends to rely on; and
(iii) the proposed relief that counsel moving the court for the preliminary objection will seek before the court in the event that the objection is upheld by the court. B

Apart from the aforesaid ruling, our courts have consistently upheld such procedure, ie in giving the other side notice at the earliest moment (see per Thomson CJ in *Gurbachan Singh v Seagrott & Campbell (No 2)* [1962] MLJ 370; per Edgar Joseph Jr J (later FCJ) in *Jasabena Sdn Bhd v Beh Heng Poo & Anor* [1985] 1 MLJ 394; per Abdul Kadir Sulaiman J (now JCA) in *Datuk Bandar Kuala Lumpur v Seman bin Amat & 2 Other Cases* [1996] MLJU 540). C

In *Bukit Melita Sdn Bhd v Lam Geok Hee & 7 Ors* [1997] 4 AMR 3160, one of the issues for determination revolved around the effect of the failure by the respondent's solicitor to give written notice of the preliminary objection to the appellant's solicitors. There I held as follows (at p 3163): D

> In my considered view, it is trite law that a party who wishes to raise any preliminary objection must give written notice to the other party's solicitors as early as possible of his intention to do so. Failure to do so would amount to a waiver of the party's right to raise the objection: *per* Mohd Hishamudin bin Mohd Yunus JC (as he then was) in *Public Bank Berhad v Berjaya Housing Development Sdn Bhd & Ors* [1985] 1 CLJ 237, and Edgar Joseph Jr J (as he then was) in *Jasabena Sdn Bhd v Beh Heng Poo & Anor* [1985] 1 MLJ 394. It was held in these two cases that the notice of preliminary objections must satisfy two requirements, viz: E F
>
> (a) the notice must be in writing; and
>
> (b) the noice should be given at the earliest possible moment to the other side who otherwise might be taken by surprise.
>
> It is obvious that the whole purpose of the notice is to promote good etiquette amongst members of the Bar and more importantly to remove the element of surprise. It is necessary that the party against whom an objection is intended to be raised should not be taken by surprise and that both parties are given equal opportunities to prepare their submissions in order to ventilate all the relevant issues; being forewarned is being forearmed. Although it is true to say that the element of surprise in the instant case is completely non-existent since the parties herein are given adequate equal opportunity and time to prepare their respective written submissions, it must be immediately emphasized that the notice of objection must at all times be given to the other side. There can be no excuse for any delay, intentional or otherwise, in giving notice to the appellant. G H
>
> Since the respondents' learned counseI has failed to give any prior written notice of the preliminary objection, I hold that the respondents are deemed to have waived their rights to do so. Waiver implies something in the nature of estoppel (see *Wong Chor San v Chop Yee Kuan* [1957] 23 MLJ 68 at p 70). I

On the aforesaid authorities, I would have thought that it would have been adequate to dismiss the preliminary objections raised by the defendant's learned counsel. However, in deference to the learned counsel whose efforts have produced volumes of written submissions filed herein, I would now give my decision thereon.

Affidavit affirmed before filing originating summons

The plaintiff's affidavit in support was affirmed on 19 November 1997 while the originating summons was filed on 27 December 1997.

In *Arab-Malaysian Finance Bhd*, the affidavit in support of the originating summons was affirmed a week before the originating summons was filed. RK Nathan J held that the said affidavit was a nullity and so was inadmissible. This decision was followed by his Lordship in *Ban Hin Lee Bank Bhd* where an affidavit affirmed on 22 June 1998 in support of an originating summons filed on 24 June 1998 was again held to be a nullity and inadmissible. These two decisions were however not followed by Azhar J in *Hong Kong Bank Malaysia Bhd v Nor Harizan Mohd Ali* [1999] MLJU 146 where an affidavit affirmed on 17 September 1996 in support of an originating summons filed on 25 September 1996 was held to be admissible, nor by Mohd Hishamudin J in *Yang Lak Man v Yang Paw Man* [1999] 4 MLJ 621 where an affidavit affirmed on 8 February 1999 in support of an originating summons filed on 1 March 1999 was similarly held admissible. In *Standard Chartered Bank Malaysia Berhad v Arivalagan a/l Krishnan & Anor* [2001] MLJU 379, on the grounds which I have given in my judgment therein, I followed *Hong Kong Bank* and *Yang Lak Man*, and held that the affidavit affirmed on 4 August 1998 in support of the originating summons filed on 10 August 1998 was admissible.

In *Multi-Purpose Bank Bhd v Diamond Agreement Sdn Bhd* [2000] 5 MLJ 576, Jeffrey Tan J did not follow *Arab-Malaysian Finance* and *Ban Hin Lee Bank Bhd* but instead held that an affidavit affirmed on 29 September 1998 in support of an originating summons issued on 30 September was not a nullity and therefore admissible.

In *Kewangan Bersatu Bhd (previously known as Kewangan Usaha Bersatu Bhd) v Metropolitan Property Holdings Sdn Bhd* [1996] 1 MLJ 79, Selventhiranathan J held that an affidavit affirmed on 17 May 1994 in support of an originating summons filed on 30 May 1994 was admissible. *Kewangan Bersatu Bhd* was followed by Suriyadi Halim Omar J in *Yip Chee Seng & Sons Sdn Bhd v Ornaconstruction Corp Sdn Bhd* [1998] MLJU 93; and by Chin Fook Yen J (as he then was) in *Selvarani a/p KV Velusamy v Sundara Raju Kasamoorthie* [1999] MLJU 223. Faiza Thamby Chik J in *Lee Thye (Sebagai Presiden dan Pemegang Jawatan Selangor Yan Keng Benevolent Dramatic Association) v Tan Sri Ngan Ching Wen (Sebagai Presiden dan Pemegang Jawatan Dewan Perhimpunan China Selangor)* [1999] 7 CLJ 95, observed that the decision in *Arab-Malaysian Finance* should be viewed with caution, particularly the conclusion that an affidavit affirmed before the filing of an originating summons is a nullity.

Chin Yoon Timber Co v Overseas Lumber Bhd [1978] 2 MLJ 173 cited for the defendant concerned the affirmation of an affidavit verifying a petition for the winding-up of a company and r 26 of the Companies (Winding up) Rules 1972 specifically provides that an affidavit verifying a petition must be 'sworn after and filed within four days after the petition is presented'. That case is not relevant to the issue of whether an affidavit in support of the originating summons must be affirmed only after the filing of the originating summons. In the context of the law of winding up of a company, that case has also not been followed or has been distinguished: *Sam Hin Timber Trading Company v Perusahaan Sri Duyong Sdn Bhd* [1983] CLJ 838 (pp 291–293 of PBA 2) per Peh Swee Chin J (later FCJ) and *Sari Atlantic Sdn Bhd v Aik Kim Enterprise* [1988] 1 MLJ 201 per Lim Beng Choon J (as he then was). *Chin Yoon Timber Co* is in my view of no assistance to the defendant here.

Sobri bin Arshad also relied on by the defendant, concerned the affirmation of an affidavit verifying petition in bankruptcy proceedings and s 6 of the Bankruptcy Act 1967 and r 106 of the Bankruptcy Rules 1969 specifically provide that the creditor's petition must be verified by an affidavit of the creditor with regard to the facts stated in the petition. That case is again not relevant to the issue of whether an affidavit in support of the originating summons must be affirmed only after the filing of the originating summons. Further, in *Kewangan Bersatu Bhd* the learned judge had decided not to follow it and described it as 'totally out of context' to the issue. In the context of the law of bankruptcy, *Sobri bin Arshad* has not been followed or has been distinguished (see *Re Mohd Sharif bin Sapie, ex p Malayan Banking Bhd* [1992] 2 MLJ 102 per VC George J (later JCA); *Re Lee Boon Hooi Ex Parte Tan Ket Huat* [1992] 4 CLJ 1903 (pp 303–307 of PBA 2) per Mahadev Shankar J (later JCA); *Teoh Thean Peng v D & C Leasing Sdn Bhd* [1993] 2 CLJ 665 per KC Vohrah J (now JCA) and *Re Koh Kim Kuay, Ex Parte: MBf Finance Bhd* [1995] 2 CLJ 145 per VC George J (later JCA)). *Sobri bin Arshad* therefore does not support the defendant's contention.

Order 83 r 2 of the RHC

The relevant provisions which the defendant contended that the plaintiff has breached viz O 83 r 2(1)–(7) of the RHC are reproduced as follows:

> (1) Where in a charge action begun by originating summons, being an action in which the plaintiff is the chargee and claims delivery of possession or payments of moneys secured by the charge or both, any defendant fails to enter an appearance, the following provisions of this rule shall apply, and references in those provisions to the defendant shall be construed as references to any such defendant.
>
> This rule shall not be taken as affecting Order 28 rule 3, or rule 5(2), in so far as it requires any document to be served on, or notice given to, a defendant who has entered an appearance in the action.
>
> (2) Not less than 4 clear days before the day fixed for the first hearing of the originating summons the plaintiff must serve on the defendant a copy of the

notice of appointment for the hearing and a copy of the affidavit in support of the summons.

(3) Where the plaintiff claims delivery of possession there must be indorsed on the outside fold of the copy of the affidavit served on the defendant a notice informing the defendant that the plaintiff intends at the hearing to apply for an order to the defendant to deliver up to the plaintiff possession of the charged property and for such other relief (if any) claimed by the originating summons as the plaintiff intends to apply for at the hearing.

(4) Where the hearing is adjourned, then, subject to any directions given by the Court, the plaintiff must serve notice of the appointment for the adjourned hearing, together with a copy of any further affidavit intended to be used at the hearing, on the defendant not less than 2 clear days before the day fixed for the hearing.

A copy of any affidavit served under this paragraph must be indorsed in accordance with paragraph (3).

(5) Service under paragraph (2) or (4), and the manner in which it was effected, may be proved by a certificate signed by the plaintiff, if he sues in person, and otherwise by his solicitor.

The certificate may be indorsed on the affidavit in support of the summons or, as the case may be, on any further affidavit intended to be used at an adjourned hearing.

(6) A copy of any exhibit to an affidavit need not accompany the copy of the affidavit served under paragraph (2) or (4).

(7) Where the plaintiff gives notice to the defendant under O 3 rule 6, of his intention to proceed, service of the notice, and the manner in which it was effected, may be proved by a certificate signed as mentioned in paragraph (5).

Upon a careful reading of O 83 r 2(1), it is clear to me that O 83 r 2(2)–(7) would be applicable only where a defendant fails to enter an appearance, in which case the defendant must be served with:

(a) a notice of appointment for the first hearing and affidavit in support: O 83 r 2(2);

(b) a notice indorsed on the outside fold of the affidavit informing the defendant that the plaintiff intends to apply for an order for the delivery of possession of the property: O 83 r 2(3);

(c) a notice of appointment for the adjourned hearing and further affidavit: O 83 r 2(4); and

(d) a notice of intention to proceed under O 3 r 6: O 83 r 2(7).

Further, under O 83 r 2(5), the plaintiff may prove the service of notices of appointment or affidavits by way of a certificate of service signed by the plaintiff or the plaintiff's solicitors (rather than by affidavit of service as in the normal way).

In *OCBC Bank (Malaysia) Bhd v Lean Seng Pottery Factory Sdn Bhd* [1999] 2 MLJ 402, the charge action was fixed for hearing on 7 October 1998 and the chargor's learned counsel appeared. The action was adjourned to 13 November 1998 when respective counsel for both parties appeared. Abdul Hamid Embong J held, inter alia, that O 83 r 2(4) which

requires the service on the defendant of a notice of appointment for the adjourned hearing and further affidavit does not apply here, but instead would only apply where the defendant had not entered an appearance, as in *Muniandy a/l Thamba Kaundan & Anor v Development & Commercial Bank Berhad & Anor* [1996] 2 CLJ 586 (FC); and *Asia Commercial Finance (M) Bhd v Kimden Housing Development Sdn Bhd* [1993] 1 MLJ 283 (see also *Multi-purpose Bank Bhd,* at p 82f).

In the instant case, the defendant had entered an appearance through its solicitors by way of a memorandum of appearance dated 22 July 1998. A notice of appointment to hear the originating summons dated 24 July 1998 was served on the defendant informing the defendant to attend the hearing of the originating summons on 24 August 1998. Learned counsel for the plaintiff and the defendant have attended subsequent hearings without fail and have indeed diligently presented voluminous written submissions. No one was deprived of the right of being heard. In the circumstances, I am unable to see any substance or merit in the defendant's contention herein.

Order 83 r 3 of the RHC

It is the defendant's case that the plaintiff must provide in the plaintiff's first affidavit all particulars under O 83 r 3(3) of the RHC. Upon a proper perusal of O 83 r 3(3) of the RHC, it seems clear to me that there is strictly no requirement in law that the first affidavit must include all the particulars such as:

(a) the amount of the advance;

(b) the amount of the repayments;

(c) the amount of any interest or instalment in arrears at the date of the issue of the originating summons and at the date of the affidavit; and

(d) the amount due under the charge.

And under O 83 r 3(7) of the RHC, where the plaintiff's claim includes a claim for interest to judgment, the amount of a day's interest.

In *Citibank NA v Ibrahim bin Othman* [1994] 1 MLJ 608, the defendant claimed that the plaintiff had failed to provide the statutory particulars required under O 83 r 3 in the first affidavit in support of its application, viz, the amount of the advance and the rate at which interest had been calculated. Mahadev Shankar J (later JCA) held, inter alia, that the plaintiff had applied for an order for sale in order to effect repayment of moneys secured by a charge and, on a reading of O 83 rr 1(1)(a), (b), (c), 3(3) and 3(6) of the RHC together, it was incumbent on the plaintiff to provide the statutory particulars in the first affidavit. The plaintiff had failed to do so and the subsequent affidavits filed before the final hearing also did nothing to remedy the earlier inadequacies as the affidavits did not correctly state the amount of the advance nor show at what rate interest had been calculated. Hence, the plaintiff's application was dismissed. The learned judge however added at p 615A–C as follows:

> It is a well-established rule of construction that unless the context specifically so excludes, words in the singular must include the plural. It is to be noted that O 83 r 3(3) gives the court the power to dispense with the statutory particulars 'in any case or class'. More than one affidavit can and is usually filed in this type of case because invariably the matter cannot be disposed of on the first return date (eg for non-service) and at least one further affidavit is always required to state the total amount due on the date of the order. Provided evidence of the correct amount due has been put before the final hearing, the court has the power to dispense some omission to fulfil the rules to the letter, but only if no real prejudice will thereby result to the defendant.

The principle enunciated above shows that the particulars under O 83 r 3(3) of the RHC may be provided in the affidavit or affidavits before the final hearing. This was followed by Jeffrey Tan J in *Multi-Purpose Bank* at pp 83f–84c; and RK Nathan J in *Bangkok Bank Bhd v Chuan Kee Co Sdn Bhd* [2000] 2 MLJ 113.

Reverting to the facts in the instant case, there is no doubt that the plaintiff has provided the statutory particulars in all the affidavits filed herein eg:

(1) the defendant had covenanted to pay to the plaintiff all outstanding principal under the term loan and bridging loan together with interest thereon under article II of the charges;

(2) the defendant had breached the covenant to pay by failing to settle all outstanding principal under the term loan and bridging loan together with interest thereon;

(3) despite demands including the Form 16D notices, the defendant had still failed to rectily its default under the charges by paying all outstanding principal under the term loan and bridging loan together with interest thereon, which are the sums secured under the charges, to the plaintiff; and

(4) the aforesaid matters clearly show the circumstances giving rise to the plaintiffs right to possession as well as right to sell the properties in order to recover the sums due and owing by the defendant.

Further, pursuant to O 83 r 3(3) of the RHC, in the plaintiff's affidavit affirmed by one Ng Chee Wah on 1 March 2001, the plaintiff has stated, at para 4 therein, that the amount of repayment is RM1,794,557.96, which consists of RM 1,720,162.56 under the term loan and RM74,395.40 under the bridging loan. In the same affidavit, the plaintiff has also stated, at para 4 therein, that the amount of interest in arrears at the date of issue of the originating summons, ie 27 December 1997, is RM7,897,182.76, which consists of RM7,191,231.12 under the term loan and RM705,951.64 under the bridging loan; and in the same affidavit, the plaintiff has also stated, at para 4 therein, that the amount of interest in arrears at the date of the affidavit, ie 1 March 2001, is RM22,594,311.43, which consists of RM20,596,057.57 under the term loan and RM 1,998,253.86 under the bridging loan.

It is to be noted that in the same affidavit, the plaintiff has stated that the total amount due under the charges at the date of hearing on 19 April 2001 is RM55,600,612.53, which consists of RM50,572,748.88 under the term loan and RM5,027,863.65 under the bridging loan. A

The plaintiff has also complied with O 83 r 3(6) of the RHC by way of affidavits in encls (7), (10), (20), (24), (25), (27) and (31) on all the dates of hearing and such affidavits which have not been challenged by the defendant are deemed to have been admitted by the defendant (see *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 (CA)). In the context of O 83 r 3(3) of the RHC, it has been held that a bare denial of a debt is not enough. The defendant as a chargor has an onus if he denies the amount claimed to say how much he admits owing (see per Mahadev Shankar J (later JCA) in *Citibank NA*, which was followed in *Multi-Purpose Bank Bhd* and *Bangkok Bank Bhd)*. B C

The plaintiff has also, in compliance with O 83 r 3(7) of the RHC, stated the amount of a day's interest in the affidavit affirmed by one Ng Chee Wah on 1 March 2001 as RM20,734.95 under the term loan and RM2,021.26 under the bridging loan. D

On the defendant's contention that the plaintiff had breached O 83 r 3(4) of the RHC by failing to give particulars of every person who to the best of the plaintiff's knowledge is in possession of the charged property, I am of the view that the plaintiff does not have to give particulars under O 83 r 3(4) of the RHC as the delivery of vacant possession in prayer 6 of the originating summons is not vacant possession to the plaintiff but to the successful buyer of the properties at the auction (see *Perwira Affin Bank Berhad v Tan Tian Ser* [1994] MLJU 156). In that case, there was a similar prayer for vacant possession. Abdul Aziz bin Mohamad J held, inter alia, that the prayer is misconceived as the chargee who wants a sale cannot be wanting possession. His Lordship added that the vacant possession is to the buyer and not to the chargee so that O 83 r 3(4) of the RHC does not apply. E F

In any event, the plaintiff has decided to abandon prayer 6 of the originating summons in which case the provision under O 83 r 3(4) of the RHC is irrelevant (see also *Co-operative Central Bank Ltd v Meng Kuang Properties Bhd* [1991] 2 MLJ 283 (HC)). G

Illegality and public policy

In respect of the defendant's contention that the charges are illegal, null and void and hence unenforceable by reason of the plaintiff's contravention of ss 16, 17, 21, 22 and 23 of the Moneylenders Act 1951 and ss 24(a), (b), (e) and 25 of the Contracts Act 1950, and on ground of public policy, it is to be observed that the ministry in question ie the Ministry of Housing and Local Government had by a letter dated 17 December 1996 extended the period of exemption to the plaintiff pursuant to s 2A(2) of the Moneylenders Act 1951 for a period of 15 years from 1 January 1991 to 31 December 2005 and would gazette the exemption which had been done vide PU(B) 144/ 1997. In the circumstances, there is no contravention of any provision of the Moneylenders Act 1951 to render the loans null and void. H I

In *Lori (M) Bhd v Arab-Malaysian Finance Bhd* [1999] 3 MLJ 81, the main issue was whether a transaction made in breach of s 67 of the Companies Act 1965 (ie financial assistance in the purchase of its own shares) is unenforceable in law in view of s 24 of the Contracts Act 1950. The Federal Court through the judgment of Edgar Joseph Jr FCJ held, inter alia, that the courts in common law countries are slow in striking down commercial contracts.

A charge action arose in *Co-operative Central Bank Ltd (In receivership) v Feyen Development Sdn Bhd* [1995] 3 MLJ 313. Upon default committed by Feyen, CCB applied for orders for sale. Feyen sought to avoid repaying the loan on the ground that the charges were illegal, void and unenforceable, being in breach of s 133(1) of the Companies Act 1965 which forbids Feyen from providing security for loans taken by its directors from third parties. The High Court accepted Feyen's argument but the Federal Court allowed CCB's appeal, holding that admitting the defence of illegality would defeat a purposive interpretation of s 133(1) and (5) of the Companies Act which is designed for the protection of Feyen, its shareholders and creditors from unlawful dissipation of its resources. The Federal Court stressed that to admit the defence of illegality to defeat CCB's application to enforce charges by way of an order for sale would provide a windfall gain to Feyen and impose substantial hardship upon CCB, and that the court would not be astute to lend its aid to enable Feyen to take advantage of its own default or breach to avoid the charges and escape its obligations thereunder.

On the same issue of public policy, the Federal Court in *Theresa Chong v Kin Khoon & Co* [1976] 2 MLJ 253 made it clear that the doctrine of public policy will not be extended beyond the classes of cases already covered by it and that no court can invent a new head of public policy. A similar sentiment was expressed by the Court of Appeal through the judgment of Mahadev Shankar in *YK Fung Securities Sdn Bhd v James Capel (Far East) Ltd* [1997] 4 CLJ 300 at pp 348d–349a.

Moratorium

Much has been mentioned about the moratorium on interest payment for every three months on a roll-over basis. This moratorium was the plaintiff's indulgence in response to the defendant's request for a six-month moratorium contained in the defendant's letter dated 3 October 1995. This indulgence certainly cannot be construed as excluding the defendant's liability to perform its obligations to repay all sums under the charges.

Form 16D notices

The defendant's grievances pertain to the absence of any reason in the Form 16D notices for all sums payable under the charges. After a careful perusal of the clauses contained in the charges, it is apparent to me that there is no such obligation on the part of the plaintiff as there is no dispute that the defendant despite the plaintiff's indulgence by way of moratorium has not

performed its obligations to pay the principal, interest and all other sums due and payable under the charges, as cl 7.1 in the charges says that the chargee may by written notice to the chargor declare the principal, interest and all other sums payable under the charges to be forthwith due and payable if the chargor fails to pay any sum due under the charges on the due date.

The defendant did not contradict or challenge the sums of RM26,697,812.09 under the term loan and RM2,614,453.70 under the bridging loan (as at 31 January 1997) due and owing by the defendant as per the ledgers and statements of account, which constitute conclusive evidence of indebtedness due and owing to the plaintiff (see *Siong Holdings Sdn Bhd v Development & Commercial Bank Bhd* [1997] 1 MLJ 340 (CA)). The plaintiff's Form 16D notices did in fact specify, inter alia, the breach in that the defendant had failed to pay the plaintiff all the sums due with interest until the date of the notices and further interest thereafter and at no time was there any reply whatsoever by the defendant to these notices. In the circumstances, I hold that the Form 16D notices have complied with s 254 of the NLC (see *Co-operative Central Bank Ltd v Meng Kuang Properties Bhd* above; *Bunbury Foods Pte Ltd v National Bank of Australasia Ltd* [1984] 153 CLR 491; *Public Bank Bhd v Chan Siok Lie & Ors* [1989] 2 MLJ 305 (HC)).

It is interesting to note that in *Bank Bumiputra Malaysia Berhad v Doric Development Sdn Bhd & 2 Ors* [1988] 1 MLJ 462, Peh Swee Chin J (later FCJ) following Barton J in *Tan Kai Kok v Thor Teik Seng* [1935] MLJ 91, held that even the failure by a chargee to specify in a notice of default, the time to remedy a breach is to be treated as an innocuous irregularity. The Privy Council in *Syarikat Kewangan Melayu Raya v Malayan Banking Bhd* [1986] 2 MLJ 253, held that the letter of demand which referred to the breach simply as the failure to repay the principal and interest accrued by the charge was a sufficient specification. The global sum due on a single account secured by both charges there was held not to have prejudiced or misled the chargee and so did not invalidate the order for sale.

Land acquisition

On the defendant's contention that the plaintiff had breached its duty of care to the defendant by failing to take steps to collect compensation until 4 February 2000 from the Wilayah Persekutuan Land Office in respect of the acquisition of part of the properties in two Forms H dated 27 April 1996, it is to be observed that after receiving the said two forms on 21 May 1996, the plaintiff had on 9 July 1996 accepted the offer for compensation, but the plaintiff managed to receive the compensation on 4 February 2000, while the defendant as the registered owner took no initiative to obtain the compensation.

In *Cuckmere Brick Co Ltd & Anor v Mutual Finance Ltd* [1971] 1 Ch 949 (CA), there was a sale of property by the mortgagee at an undervalue, while *Standard Chartered Bank Ltd v Walker & Anor* [1982] 3 All ER 938 (CA) concerned the sale by the receiver of the company's stock, also at an

undervalue. The facts in these two authorities relied on by the defendant are not on all fours with the instant case, where there was no sale at an undervalue but a compulsory purchase by way of acquisition. That being the case, these two authorities are of no assistance to the defendant.

Penalty or excessive interest

The defendant's complaint that the plaintiff's claim of interest is excessive and irrecoverable has to be examined in the light of s 75 of the Contracts Act 1950 which is reproduced as follows:

> Compensation for breach of contract where penalty stipulated for
>
> When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

To invoke s 75, the defendant must establish that:

(1) the plaintiff's claim for interest is the amount to be paid in case of a breach of contract under the charges, as distinct from the amount which the defendant has to pay in any event independent of any breach under the charges; and

(2) if the plaintiff's claim for interest is the amount to be paid in case of a breach of contract under the charges, whether it was excessive in nature.

The plaintiff's claim for interest is provided for in cll 3(a), (b), 3.2(a), (c) which merit reproduction as follows:

> 3 Interest
>
> (a) The Chargor shall pay interest on the Term Loan or any part thereof from time to time outstanding at the rate Nine Point Five Percent (9.5%) per annum as well after as before judgment (*hereinafter called 'the ruling rate' which expression shall include such other rate as the Bank may from time to time by notice in writing stipulate*) on monthly rests and such interest shall be paid by the Chargor to the Chargee by monthly payments ... .
>
> (b) Interest on any principal moneys for the time being hereby secured including capitalized interest shall at the end of each calendar month be capitalized and added for all purposes to the principal sum then owing and shall henceforth bear interest at the ruling rate and be secured and payable accordingly and all the covenants and conditions contained in or implied by these presents and all powers and remedies conferred by law or by these presents and all rules of law or equity in relation to the said principal sum and interest shall equally apply to such capitalized arrears of interest and to interest on such arrears.

3.2 Variation of Interest

(a) Notwithstanding the provisions relating to the rate of interest as herein provided, or the ruling rate, the Chargor agrees and the Chargee is entitled at any time and from time to time vary the rate of interest as herein provided, or the ruling rate. ...

(b) ... ...

(c) The Chargee shall give notice of the rate of interest, or the ruling rate, to the Chargor but failure by the Chargee to give notice shall not prejudice or have the effect of invalidating any such variation. Notice by the chargee may take any form. (Emphasis added.)

The plaintiff's claim for interest under cl 3.1(a) of the charges, ie at the rate of 9.5%pa, is nothing unusual or objectionable under s 75 of the Contracts Act 1950, as the defendant would have to pay the same to the plaintiff in any event for the loss of use of funds disbursed to the defendant independent of any breach of contract by the defendant under the charges. In *Realvest Properties Sdn Bhd v Co-operative Central Bank Ltd (In receivership)* [1996] 2 MLJ 461, Peh Swee Chin FCJ (as he then was) in delivering the judgment of the Federal Court held that there was nothing unusual or anything objectionable for the 'starting rate' of 14.5%pa provided in cl 3.1 of the charge annexure there.

In addition, the plaintiff's claim for interest over and above the said 9.5%pa is sustainable under cl 3.2(a) thereof as the defendant has agreed that the plaintiff may vary the interest rate or the ruling rate at any time.

The plaintiff has under cl 3(2)(c) thereof given notices of variation of interest to the defendant from time to time, as was shown in letters dated 24 November 1995 (9.75%), 1 March 1996 (10.25%), 30 May 1996 (10.75%), 1 August 1997 (11.25%), 29 November 1997 (11.75%), 31 December 1997 (13%) and 27 January 1998 (16.50%) ('varied rates').

The defendant's contention that it has no record of receipt of the notices of variation is immaterial in view of cl 3.2(c) thereof which provides that any failure by the plaintiff to give notices of variation of interest shall not prejudice or have the effect of invalidating any such variation of interest.

Since the defendant has agreed to the varied rates, the question of excessive interest does not arise (see *Pusat Bandar Damansara Sdn Bhd & Anor v Yap Han Soo & Sons Sdn Bhd* [2000] 1 MLJ 513 (CA), which was followed by KC Vohrah J (later JCA) in *Sogelease Advance (Malaysia) Sdn Bhd v Jantsco Sdn Bhd & Ors* [2001] 5 CLJ 536).

In *Bhai Panna Singh v Bhai Arjun Singh* (1929) AIR 179 (PC), the Privy Council established the requirement for the plaintiff to prove the damages suffered in the context of s 74 of the Indian Contracts Act 1782 which is in pari materia with our s 75. In the circumstances, that decision does not render any assistance to the defendant. It is pertinent to restate the principle that in our country there is no difference between penalty and liquidated damages (see per Thomson J (later LP) in *SS Maniam v The State of Perak* [1957] MLJ 75 which was followed by the Court of Appeal in *Reliance Shipping & Travel Agencies v Low Ban Siong* [1996] MLJ 543).

In *Co-operative Central Bank Ltd v Meng Kuang Properties Bhd*, Lim Beng Choon J found the plaintiff's demand for penalty interest to be wrongful, as the plaintiff had failed to comply with cl 5 of the charge there which required a notice to be served on the defendant. In the case before me, the relevant notice of variation of interest has been served on the defendant in compliance with cl 3.2(c) of the charges. Further, the charge in *Co-operative Central Bank Ltd (In Receivership)*, did not contain any clause to the effect that the plaintiff's failure to give the defendant notice shall not prejudice the plaintiff's right, which was expressed in cl 3.2(c) of the charges in the case before me. In *Arab (Malaysian) Merchant Bank Bhd & Ors v Court Square Pelita Sdn Bhd & Ors* [2000] 5 MLJ 273, there was a provision for the variation of interest to be valid even if there was no notice, as in the instant case. Ian Chin J came to the same conclusion, thereby distinguishing *Central Co-operative Bank Ltd (In Receivership)* and *Credit Corp (M) Bhd v Lucky Height Development Sdn Bhd & Ors* [1996] 4 MLJ 556 on the facts. In *Perwira Affin Bank Bhd (formerly known as Perwira Habib Bank Malaysia Bhd) v WT Low & Ng Realty Sdn Bhd* [1997] 5 MLJ 185, there was no express provision to the same effect as in cl 3(2)(a) of the charges in the case before me and so that case may be distinguished accordingly.

The defendant's contention that the plaintiff's claim for interest is excessive and against public policy does not appear to have any merit as the said interest had been agreed by the plaintiff and the defendant, which has been incorporated in all the charges after proper legal advice and representation. No such complaint was raised by the defendant at the inception, approval and disbursement of the loans.

Nature of charge action and judge's duty

The defendant's submission that there is a dispute of facts which should not be dealt with in the originating summons is, in my view, unmeritorious. There is not the slightest doubt that the matter before me is a charge action praying for an order for sale and under O 83 r 2(1) of the RHC, it may be begun by writ or originating summons. It is an established practice and procedure in our courts that charge actions are almost invariably commenced and proceeded with by way of an originating summons, since such proceedings, in particular the instant case, pertain to the construction of the charge document and this mode of commencement provides a relatively swift and simple means of obtaining relief (see also *Malaysian High Court Practice* 1998 MLJ Desk Ed Para 7.1.2 pp 96–110.) The nature, rights and obligations of the parties in such a charge action has been authoritatively stated with unrivalled clarity by Eusoff Chin SCJ (later CJ Malaysia) in the then Supreme Court in *Kandiah Peter v Public Bank Bhd* [1994] 1 MLJ 119 as follows:

> The principles governing the matter are well settled by authority and are not open to question. A chargee who makes an application for an order for sale in foreclosure proceedings under s 256 of the Code does not commence an action. He merely enforces his rights as a chargee by exercising his statutory remedy against the chargor in default. The chargee, therefore, does not sue for a debt. It is also clear that his claim for an order for sale is not based upon a

> covenant but under the registered charge. The order for sale when made under s 256 of the Code is not a judgment or a decree. The court hearing the application for foreclosure does not make, and in any event ought not to make, any adjudication upon any substantive issue. These principles are culled from several decisions of our courts which have correctly stated the law upon the subject.

In the present application for an order for sale, the burden of proof lies on the defendant to show the existence of cause to the contrary under s 256(3) of the NLC. In *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77 the Federal Court enunciated that the expression 'cause to the contrary' in s 256(3) of the NLC is limited to only the following three categories:

(1) when a chargor is able to bring his case within any of the exceptions to the indefeasibility doctrine in s 340 of the NLC;

(2) when a chargor is able to demonstrate that the chargee has failed to meet the conditions precedent for the making of an application for an order for sale; and

(3) when a chargor is able to demonstrate that the grant of an order for sale would be contrary to some rule of law or equity.

The Federal Court gave a very narrow and restrictive interpretation of the words 'cause to the contrary' and explained their reasons as follows (at pp 87–88):

> We are conscious that the approach we have adopted results in a very narrow and restrictive interpretation of s 256(3) of the Code. But there are good reasons of policy for such an interpretation. It must not be forgotten that in the ordinary way, banks and other financial institutions loan moneys deposited with them by their customers to a borrower on the faith of the security of a charge created over the landed property of the borrower, or as here, of a third party. In the event of a default by the borrower, the lending institution normally looks to early recovery of all or a substantial part of the money due to them from a sale of a security. If the courts of this country interpret the phrase 'cause to the contrary' appearing in s 256(3) of the Code liberally, then, institutional lenders would lose confidence in their right to realize their security through an order for sale. Financial institutions would then become reluctant to lend money to bona fide entrepreneurs. Commerce would come to a standstill and the development of land and industries in this country which are largely dependent upon loans from banks would cease. No judgment of this court will be designed to produce such a consequence.

The Federal Court stated the approach to be taken by a judge in hearing an application under s 256 of the NLC is as follows (at pp 88–89):

> A judge hearing an application under s 256 must bear in mind that the procedure under the section is meant to be speedy and summary in nature. He is first concerned with whether the chargee has given the appropriate statutory notices as stipulated in the Code. Next, he must ensure that the procedural requirements prescribed by O 83 of the Rules of the High Court 1980 have been complied with. Next, he is concerned with the very narrow question whether the material produced before him by the chargor constitutes cause to the contrary.

> In this last respect, if he is satisfied, on a careful and an objective assessment of the factual material made available to him, that the chargor has shown cause to the contrary in the sense we have discussed earlier in this judgment, he will refuse an order for sale. On the other hand, if he finds as a matter of law that the allegations raised by the chargor do not constitute cause to the contrary he will merely say so, giving his reasons, and grant the chargee's application.
>
> On no account should he express any view on the merits of any or all of the points taken by the chargor, save to say whether, having regard to the three narrow categories we have laid down in this judgment and the relevant authorities upon each category, cause to the contrary has been established to his satisfaction. This is because, for reasons which will appear in a moment, any view expressed by a judge on the general merits of the points taken by the chargor will be purely academic.
>
> ...
>
> A judge who makes an order for sale merely finds that the facts relied upon by the chargor to resist the chargee's application do not constitute cause to the contrary. He is unconcerned with the issue whether the same facts are sufficient to support an action in personam that may be brought by the chargor against the chargee. There is thus no determination of an issue or a cause for an estoppel to operate against the charger's action.

In *Standard Chartered Bank Malaysia Berhad v Arivalagan all Krishnan & Anor* [2001] MLJU 379, I applied the aforesaid principles of the Federal Court and not the Court of Appeal, as was stated in my said judgment.

Result

The defendant's learned counsel has done his competent best and attempted to show that there exist 'causes to the contrary' and therefore an order for sale ought not to be granted. On the aforesaid grounds, I am constrained to conclude that the defendant has failed to establish any cause to the contrary. I therefore make an order for sale in terms of encl (2) herein to realize the sum of RM62,044,170.45 outstanding on 7 January 2002 based on the affidavit affirmed by one Mr Lee Kim Mun on 27 December 2001.

Plaintiff's application allowed.

Reported by Lim Lee Na